Pursuant to Court order

FILED
JUL 14 2014
CLERK
SUPREME COURT

Commonwealth of Kentucky
Supreme Court
No. 2013-SC-828-TG

ANN BAILEY SMITH
CHIEF JUDGE, JEFFERSON DISTRICT — **APPELLANT**

v.

Appeal from Jefferson Circuit Court
Hon. Judith McDonald-Burkman, Judge
No. 13-CI-003689

COMMONWEALTH OF KENTUCKY
EX REL. MICHAEL J. O'CONNELL
AND
TIMOTHY HIGGINS — **APPELLEES**

Brief for Amici Curiae
Kentucky County Attorneys Association Inc.

Certificate of Service

I certify that the record on appeal has not been checked out from the Clerk's office. I also certify that a copy of this brief has been served this 26th day of June, 2014, by mailing to: Hon. Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Ky. 40202; counsel for the Commonwealth, Hon. David Sexton, Assistant County Attorney, Jefferson County Attorney's Office, Fiscal Court Building, 531 Court Place, Suite 900, Louisville, Ky. 40202; counsel for appellee Timothy Higgins, Hon. J. Bruce Miller, J. Bruce Miller Law Group, 325 West Main Street, 20th Floor, Louisville, Ky. 40202; counsel for appellant, Hon. Virginia Hamilton Snell, Hon. Deborah H. Patterson, and Hon. Sara Veeneman, WYATT, TARRANT, & COMBS, LLP, 2800 PNC Plaza, 500 West Jefferson Street, Louisville, Ky. 40202.

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TABLE OF POINTS AND AUTHORITIES

Introduction

In this case the Court agreed to review an appeal by Jefferson District Court Chief Judge Ann Bailey Smith (appellant) regarding the legality of the traffic safety program administered by the Jefferson County Attorney Michael O'Connell (appellee) under KRS 186.574(6) as an alternative to trial.

The Kentucky County Attorneys Association Incorporated has an interest in the Court's ruling in this case. Subsection (6) of KRS 186.574 was added to the statute during the 2012 Regular Session of the General Assembly by HB 480, Kentucky Acts 2012, Chapter 107, effective July 12, 2012, at the request of the County Attorneys Association. Over 60 County Attorneys operate traffic safety programs under KRS 186.574(6) as a means to fund operations of their offices because of the limited funding provided by the General Assembly to support the criminal prosecution function of County Attorneys. Funds collected through the County Attorneys' traffic safety programs are subject to review by the Prosecutors Advisory Council, appointed by the Governor under KRS 15.705, with the Attorney General as *ex officio* chair.

Statement of the Case[1]

On March 1, 2013, appellee Higgins was issued a speeding citation, Jefferson District Court case no. 13-T-015915. (App. L). Upon successful completion of the traffic safety program administered by the appellee Jefferson County Attorney, on June 4, 2013, the Commonwealth (County Attorney) filed a written motion for the court to dismiss the case

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[1]The Jefferson Circuit Court Clerk had failed to paginate the court record when counsel reviewed that record on file at that office. Thus, this brief cites to the appendix to appellant's brief as App since there is no proper way to cite the circuit court record.

(App. A. p.1). In an opinion and order issued on June 25, 2013, the District Court declined to do so unless Higgins paid court costs (App. B). That opinion omitted any discussion of Higgins' constitutional right to demand a trial in the event that he declined to pay the court costs. On July 23, 2013, appellees filed a petition for writ of mandamus with legal memorandum in Jefferson Circuit Court (no. 13-CI-003689) against the Jefferson District Court (appellant Judge Smith) to compel that Court to grant dismissal without payment of court costs (App. A. p.1). Judge Smith through counsel filed a response opposing the Commonwealth's petition (App. A. pp. 1 &4). On July 23, 2013, the Jefferson Circuit Court issued an opinion and order granting the writ (App. A). Judge Smith appealed that order, and this Court transferred the appeal to this Court (order entered April 17, 2014).

Preservation

The issues on appeal were preserved by the appellees through the Commonwealth's motion to dismiss filed in Jefferson District Court and through the appellees' joint petition for writ of mandamus filed in the Jefferson Circuit Court.

ARGUMENT

Neither KRS 186.574(6) nor KRS 24A.175(3) authorize the District Courts to impose court costs as condition upon granting the Commonwealth's motion to dismiss in speeding cases based upon successful completion of the County Attorney's traffic safety program.

As amended by HB 480, Kentucky Acts 2012, Chapter 107, effective July 12, 2012, KRS 186.574 (5)(a) and (6) states:

> (5) The following procedures shall govern persons attending state traffic school pursuant to this section:
>
> (a) A person **convicted** of any violation of traffic codes set forth in KRS Chapters 177, 186, or 189, and who is otherwise eligible, may in the sole discretion of the trial judge, be **sentenced** to attend state traffic school. Upon

payment of the fee required by subsection (4) of this section, and upon successful completion of state traffic school, the sentence to state traffic school **shall be the person's penalty in lieu of any other penalty, except for the payment of court costs**;

* * * *

(6) (a) Except as provided in paragraph (b) of this subsection, a county attorney may operate a traffic safety program for traffic offenders **prior to the adjudication of the offense**.

(b) Offenders alleged to have violated KRS 189A.010 or 304.39-080[2], offenders holding a commercial driver's license under KRS Chapter 281A, or offenders coming within the provisions of subsection (5)(b) or (c) of this section shall be excluded from participation in a county attorney-operated program.

(c) A county attorney that operates a traffic safety program:

1. May charge a reasonable fee to program participants, which shall only be used for payment of county attorney office operating expenses; and

2. Shall, by October 1 of each year, report to the Prosecutors Advisory Council the fee charged for the county attorney-operated traffic safety program and the total number of traffic offenders diverted into the county attorney-operated traffic safety program for the preceding fiscal year categorized by traffic offense.

(d) Each participant in a county attorney-operated traffic safety program shall, **in addition to the fee payable to the county attorney, pay a twenty-five dollar ($25) fee to the court clerk**, which shall be paid into a trust and agency account with the Administrative Office of the Courts and is to be used by the circuit clerks to hire additional deputy clerks and to enhance deputy clerk salaries.
[Emphasis in bold added.]

KRS 24A.175 (1) and (3)[3] states:

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[2] This provision was amended by SB 199, the Revisor of Statutes bill, Kentucky Acts 2014, Chapter 71, Section 8, subsection (6)(b), to correct the reference of KRS 304.30-010 to KRS 304.39-080. As explained in SB 199, Section 1, subsection (7), the original reference number was in error. Therefore, the correct number has been inserted as directed by this bill.

[3] HB 90, Kentucky Acts 2014, Chapter 81, Section 2, amended KRS 24A.175 by adding a new subsection (5) regarding juvenile offenders. That provision is not at issue in this case.

> (1) Court costs for a criminal case in the District Court shall be one hundred dollars ($100), regardless of whether the offense is one for which prepayment is permitted.
>
> * * * *
>
> (3) The taxation of court costs against a defendant, **upon conviction in a case**, including persons **sentenced** to state traffic school as provided under KRS 186.574, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a **plea bargain or otherwise**, unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.
> [Emphasis in bold added.]

Black's Law Dictionary, 9th Ed. (2009), defines **"adjudication"** as, "1. The legal process of resolving a dispute; the process of judicially deciding a case. 2. JUDGMENT." Under the word "judgment", Black's Law Dictionary defines "deferred judgment" as "A judgment placing a convicted defendant on probation, the successful completion of which will prevent entry of the underlying judgment of conviction. • This type of probation is common with minor traffic offenses.—Also termed deferred adjudication; deferred-adjudication probation; deferred prosecution; probation before judgment; probation without judgment; pretrial intervention; adjudication withheld."

Black's Law Dictionary, 9th Ed. (2009), defines **"plea bargain"** as, "A negotiated agreement between a prosecutor and a criminal defendant whereby the **defendant pleads guilty** to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of the other charges." (Emphasis in bold added.) Kentucky courts have recognized that normally a defendant must enter a guilty plea in order to adopt a plea bargain. Cope v. Commonwealth, 645 S.W.2d 703, 704 (Ky. 1983); Adkins v. Commonwealth, 647 S.W.2d 502, 504 (Ky. App. 1982); Wiley v. Commonwealth, 575 S.W.2d 166, 168 (Ky. App. 1978)(discussing the meaning of

"plea bargaining"); Hoskins v. Maricle, 150 S.W.3d 1, 21-22 (Ky. 2004)(noting that plea agreement is executory until guilty plea is entered and approved by the court).

RCr 8.04(1), (3), and (5) states:

> (1) Generally. The attorney for the Commonwealth and the defendant may agree, subject to the approval of the trial court, that the prosecution will be **suspended for a specified period** after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties. The agreement (or any mutually agreed upon subsequent modifications to the agreement) must be in writing and signed by the parties.
>
> * * * *
>
> (3) Filing of agreement; release. Promptly after the agreement is made, the Attorney for the Commonwealth shall file the agreement together with a statement that **pursuant to the agreement the prosecution is suspended for a period specified in the statement.** Upon this filing and approval by the trial court, the defendant must be **released from custody** on the charges for which diversion is granted.
>
> * * * *
>
> (5) Termination of the agreement; automatic dismissal. **Upon the expiration of the period of suspension of prosecution and upon the completion of the agreement and where there is no motion by the Attorney for the Commonwealth to terminate** the agreement upon any grounds permitted under this Rule, the indictment, complaint or charges which are the subject matter of the agreement **shall be dismissed** with prejudice. In the event that there may be a pending motion by the Commonwealth to terminate the agreement, if the Court shall rule that the motion be denied, then upon entry of said order the indictment, complaint or charges shall be dismissed with prejudice.
>
> [Emphasis in bold added.]

KRS 186.574(6) requires that the defendant complete the traffic safety program **before** "adjudication". However, the trial court's approval of a pretrial diversion would constitute the first part of the process of adjudication of the case because RCr 8.04 requires automatic dismissal in the absence of a motion to terminate diversion. Thus, KRS 186.574(6) does not require or even authorize the court to pre-approve the defendant's participation in the county attorneys' traffic safety programs because court approval would shift that

program from pre-adjudication into an adjudication by the court, as reflected by the definition of "adjudication" quoted above. In requiring the defendant to complete the County Attorney's traffic safety program before adjudication the General Assembly intended to save court time by avoiding any need for any judge to oversee the defendant's compliance with the program in contrast to type of pretrial diversion authorized by RCr 8.04.

Moreover, RCr 8.04 refers to agreements that **require suspension** of the prosecution. See also, Ballard v. Commonwealth, 320 S.W.3d 69, 73 (Ky. 2010), noting that an order of pretrial diversion "halts prosecution"; Flynt v. Commonwealth, 105 S.W.3d 415, 424 (Ky. 2003), pretrial diversion is an "interruption of prosecution". Unless a suspension of the prosecution is required by the agreement between the Commonwealth and the defendant, RCr 8.04 by its plain language does not apply.

In this case the District Court erroneously concluded the dismissal agreement between the Commonwealth and the defendant automatically resulted in the prosecution being "suspended for a specific period of time". The District Court stated, "In this case the 'specified period' is the time between when defendant was cited on March 1, 2013, and the next court date at which a motion to dismiss is made." (App. B. p. 10). The mere existence of some pretrial delay does not necessarily operate as a suspension of the prosecution. See Barker v. Wingo,407 U.S. 514 (1972), and Vermont v. Brillon,556 U.S. 81 (2009)(both explaining Sixth Amendment constitutional standard for a speedy trial). Although RCr 8.04 and rulings by this Court require a pretrial diversion agreement to be approved by the trial court in order to "suspend" the prosecution, KRS 186.574(6) does not require a suspension

of the prosecution, and neither party requested a suspension of the prosecution in this case. The District Court never ordered a suspension of the prosecution in this case. The District Court confused a dismissal agreement under KRS 186.574(6) with the entirely different agreement for pretrial diversion of the prosecution that would necessarily require a suspension of the prosecution in order to be implemented.

The District Court erroneously characterized its determination that the County Attorney's traffic safety program/dismissal agreement was a pretrial division agreement as a finding of fact (App. B. p. 21). That determination is a legal conclusion because it involves the interpretation of the statute and court rule and the application of legal principles and definitions to the facts, and not the determination of historical events. See Ornelas v. United States, 517 U.S. 690, 696-697 (1996), citing, Pullman-Standard v. Swint, 456 U.S. 273, 289, fn. 19 (1982), both cited in Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998), regarding the *de novo* review standard for legal conclusions. Therefore, the District Court's legal conclusion on that point is not binding on this Court under the *de novo* review standard.

RCr 8.04 also refers to releasing the defendant from custody, which implies that the rule applies to misdemeanors with potential jail sentences rather than traffic violations. Likewise, language in Flynt v. Commonwealth, 105 S.W.3d 415, 418, fn. 10 (Ky. 2003), also implied that the rule was intended to apply to misdemeanors.

The District Court failed to recognize that this Court has held that the prosecutor may enter into an agreement for dismissal or non-prosecution conditioned upon the defendant performing some action requested by the prosecution according to the agreement before trial

and has never required that court approve such an agreement in advance of a defendant's performance of his part of the agreement. Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), *overruled in part on other grounds*, Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991); Commonwealth v. Reyes, 764 S.W.2d 62, 65-66 (Ky. 1989); Cash v. Commonwealth, 892 S.W.2d 292 (Ky. 1995).

Likewise, in Hoskins v. Maricle,150 S.W.3d 1, 22-24, and fn.16 (Ky. 2004),this Court recognized the difference between a plea agreement in which the defendant pleads guilty to one or more offenses in return for a sentence recommendation, even if one or more counts are dismissed, as different from a pure dismissal because any sentence or penalty for a crime involves the court's sentencing discretion. The dismissal agreement in this case did not involve any sentence or penalty for any offense. "Unless the court finds that the prosecutor is clearly motivated by considerations other than his assessment of the public interest, it must grant the motion to dismiss." Hoskins v. Maricle, at 20-21, quoting, United States v. Hamm, 659 F.2d 624, 630 (5th Cir. 1981). Also see id. at 24, citing United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975). Because KRS 186.574(6) authorized the County Attorney to create his traffic safety program and to request dismissal based upon Higgins' successful completion of the program before adjudication, the Commonwealth's motion to dismiss was not contrary to the public interest as determined by the General Assembly in enacting KRS 186.574(6). Pre-approval of the dismissal agreement by the District Court was not required by the plain language of KRS 186.574(6), nor was it required by the plain language of RCr 8.04.

Nothing in KRS 186.574(6) requires the defendant to pay court costs in contrast to

KRS 186.574(5)(a), which requires defendants convicted and sentenced to the Transportation Cabinet traffic school to pay court costs. The differences in wording between subsections (5)(a) and (6) of KRS 186.574 are significant as reflecting legislative intent especially since both provisions are in the same section. In Fox v. Grayson, 317 S.W.3d 1, 8-9 (Ky. 2010), the Court discussed the rule of statutory construction regarding the significance of omitted language and explained:

> It is a familiar and general rule of statutory construction that the mention of one thing implies the exclusion of another. This basic tenet of statutory construction is usually referred to by the Latin phrase *expressio unius est exclusio alterius.* *** Because the *expressio unius* maxim is only a rule of construction, and not substantive law, we must use it only when that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. **In other words, *expressio unius* is most helpful when there is a strong, unmistakable contrast between what is expressed and what is omitted.** [Internal quotations, citations, and footnotes omitted. Emphasis added.]

Because of the express provision in subsection (5)(a) for payment of court costs and the employment of the Transportation Cabinet program as part of sentencing in contrast with the language in subsection (6) regarding what the defendant must pay with its omission of court costs and with the subsection (6) requirement to complete the program before "adjudication", the intention of the General Assembly is clear that dismissal agreements under subsection (6) do not require or justify the District Court to impose court costs for a dismissal. Moreover, since subsection (6) of KRS 186.574 was enacted later than KRS 24A.175 and since KRS 186.574(6) is the more specific statute, even in the event that the Court finds a conflict between the two statutes, KRS 186.574(6) should prevail. Maynes v. Commonwealth, 361 S.W.3d 922, 930-931 (Ky. 2012).

KRS 24A.175(3) does not mention dismissal agreements, unless the Court construes "or otherwise" as empowering a court to impose a "sentence" upon dismissal. The Court has previously ruled that imposition of court costs is part of sentencing in construing the similar statute regarding court costs in circuit court, KRS 23A.205. Travis v. Commonwealth, 327 S.W.3d 456, 459 (Ky. 2012); Buster v. Commonwealth, 381 S.W.3d 294, 305 (Ky. 2012). "The statutes concerning payment of court costs by a convicted defendant suggest that the trial court is to make all such determinations in its final judgment. Court costs are to be taxed 'upon conviction.' *** [T]he decision to impose or waive court costs is to be made by the trial court by or at the time of sentencing." Buster, at 305. Likewise those opinions view court costs as subject to review as a type of punishment similar to a fine by expressly employing the same standard of review as the Court uses for prison sentences and fines.

The Court has previously held that entering into a pretrial diversion agreement, even when a provisional guilty plea is part of that process per KRS 533.256, is not a conviction for sentencing purposes under KRS 532.080. Commonwealth v. Derringer, 386 S.W.3d 123 (Ky. 2012). The Court noted that "pretrial diversion is not a sentencing alternative." Id. at 130. The Court's comparison of diversion under KRS 533.256 and RCr 8.04in Flynt v. Commonwealth, 105 S.W.3d at 424, refutes any contention that pretrial diversion under RCr 8.04 amounts to a sentence or conviction. Nothing in those opinions supports any inference that any type of pretrial diversion agreement, even with a provisional guilty plea, is a conviction for legal purposes, unless revoked by the court for good cause. "When a defendant is granted pretrial diversion on a felony conviction [under KRS 533.256], a sentence for that conviction is not imposed, if ever, unless and until the pretrial diversion

agreement is voided." Derringer, 386 S.W.3d at 126. "The trial court imposes a sentence on the defendant only after diversion is revoked and the trial court holds a sentencing hearing." Id. at 130.

The District Court's opinion also seemed to indicate that a defendant could be required to agree to pay court costs without a conviction or sentencing hearing even if not authorized by statute. However, this Court has held that even the fact that a defendant has agreed to an illegal sentence does not necessarily make that sentence enforceable. McClanahan v. Commonwealth, 308 S.W.3d 694, 689 (Ky. 2010); Jones v. Commonwealth, 382 S.W.3d 22, 27 (Ky. 2011). The Commonwealth's dismissal agreement did not operate as a form of probation requiring supervision by a court or probation officer.

A defendant is constitutionally presumed innocent until proven guilty beyond a reasonable doubt in a court of law, unless he enters a guilt plea. Taylor v. Kentucky, 436 U.S. 478 (1978). The District Court did not make any finding that Higgins had entered a guilty plea, and no argument that Higgins had entered a guilty plea was made in the Jefferson Circuit Court. A rejected plea offer or a rejected attempt at pretrial compromise is not admissible as evidence of guilt per KRE 410 and KRE 408. In the Jefferson Circuit Court, Judge Smith's attorneys focused upon the prepayment language in KRS 24A.175(1), and viewed the dismissal agreement under KRS 186.574(6) as the same as prepayment, but the prepayment form requires a defendant to admit his guilt, i.e., entering a guilty plea via mail, as part of the prepayment process. Thus, that argument confuses a guilty plea case with a case in which there has not been a guilty plea because under KRS 186.574(6) the defendant's participation in the County Attorney's traffic safety program is prior to

adjudication whereas under KRS 186.574(5)(a) the defendant's participation in the Transportation Cabinet program occurs after guilt was determined as part of a court imposed sentence.

Because KRS 186.574(6) requires that the defendant enter and complete the County Attorney's traffic safety program prior to "adjudication", and there was no dispute raised in the Jefferson Circuit Court regarding the time at which Higgins completed the program, there is no basis to infer that Higgins had already gone to trial or entered a guilty plea. Thus, construing KRS 24A.175 per the opinion of the District Court as allowing a court to impose a "sentence" in the form of court costs without a trial or a guilty plea creates a number of constitutional issues. None of those issues were addressed by the District Court's opinion, but if this Court adopts the District Court's ruling, all of those issues will need to be addressed in order to insure that the lower courts enforce this Court's ruling in accordance with constitutional requirements. "[I]f there are two ways to reasonably construe a statute, one upholding the validity and the other rendering it unconstitutional, we must adopt the construction which sustains the constitutionality of the statute. " Flynt v. Commonwealth, 105 S.W.3d 415, 423 (Ky. 2003)(quotation marks and citations omitted). Therefore, the District Court erred by construing KRS 186.574(6) in a manner that causes it to become unconstitutional by imposing a sentence in the form of court costs upon a dismissal without any guilty plea or trial verdict of guilty.

In addition, the District Court acted outside its authority in attempting to unilaterally change the terms of the Commonwealth's dismissal agreement with the defendant. See Hoskins v. Maricle, 150 S.W.3d at 5. *Cf.* Prater v. Commonwealth, 421 S.W.3d 380, 387

(Ky. 2014), citing, Haight v. Commonwealth, 938 S.W.2d 243, 251 (Ky. 1996), and Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992). Under this Court's rulings, the District Court lacked any power to engage in an attempt to re-negotiate any agreement between the Commonwealth and the defendant or to preempt Higgins' constitutional right to a trial without his guilty plea and to deny Higgins' right to withdraw from any agreement with the Commonwealth upon rejection by the court.

In summary, the District Court committed the following errors: (1) confusing the pre-adjudication County Attorney's traffic safety program authorized by KRS 186.574(6) with the post-adjudication traffic safety program administered by the Transportation Cabinet; (2) operationally treating appellee Higgins as guilty and imposing a sentence in the form of court costs in the absence of any guilty plea or trial verdict of guilty; (3) confusing a legal conclusion in interpreting the law with a finding of historical fact regarding the legal nature of the dismissal agreement in this case and dismissal agreements under KRS 186.574(6); (4) declaring any and all pretrial delay to automatically constitute a suspension of the prosecution contrary to court rulings regarding the Sixth Amendment constitutional right to a speedy trial; (5) attempting to unilaterally revise the dismissal agreement between the parties in violation of the rulings by this Court that require trial judges to abstain from re-negotiating agreements between parties in criminal cases; and (5) denying the Commonwealth's motion to dismiss the case in violation of the public policy enacted by the General Assembly in KRS 186.574(6) and in violation of the legal criteria adopted by this Court in Hoskins v. Maricle, *supra*. Therefore, the Jefferson Circuit Court acted properly within its discretion in granting the Commonwealth's and Higgins' petition for writ of

mandamus to compel the appellant District Court Judge to dismiss the traffic violation citation in this case. K.R. v. Commonwealth, 360 S.W.3d 179, 183-184 and 189 (Ky. 2012); Hoskins v. Maricle, 150 S.W.3d at 5-6 and 10.

Conclusion

For the foregoing reasons, the order of the Jefferson Circuit Court granting appellees' petition for writ of mandamus against appellant should be affirmed.

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